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In the Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE INNOCENCE PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project, Inc. is a nonprofit legal clinic and criminal justice resource center. Founded by Professors Barry Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law/Yeshiva University in 1992, the Innocence Project provides pro bono legal services to indigent prisoners and death row inmates for whom post-conviction DNA testing can provide conclusive proof of innocence. The Innocence Project pioneered the litigation model that has exonerated, to date, at least 163 innocent persons through post-conviction DNA testing, and has served as lead or co-counsel in the majority of these cases. Currently, the Innocence Project represents more than 100 clients seeking post-conviction DNA testing in dozens of states around the nation.

In addition to seeking relief for its clients under state DNA testing statutes (which the Innocence Project helped author and/or enact into law by contributing technical expertise during the legislative process), the Innocence Project has also served as chief counsel in the leading cases concerning the federal constitutional right of access to potentially exculpatory DNA evidence. These include, inter alia, *Osborne v. District Attorney's Office for Third Judicial District*, 423 F.3d 1050 (9th Cir. 2005); *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002); and *Godschalk v. Montgomery County District Attorney's Offic* 177 F. Supp. 2d 366 (E.D. Pa. 2001). The Innocence Project also regularly consults with legislators and law enforcement officials on the state, local, and federal level, conducts research and training,

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[1] Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned co.. el. No person or entity other than *Amicus* and its counsel made any monetary contribution to the preparation of this brief.

produces scholarship, and proposes a wide range of remedies to prevent wrongful convictions, while continuing its primary work to exonerate individual clients through post-conviction DNA testing.

SUMMARY OF ARGUMENT

DNA testing has exposed deeply rooted, systemic problems with the criminal justice system, demonstrating with unprecedented certainty that more innocent people suffer in prison or await execution than most lay citizens and legal scholars have ever imagined.[2] Analysis of DNA exonerations has revealed a variety of common causes for wrongful convictions, including faulty eyewitness identification; false confessions; careless or fraudulent forensic evidence; junk science; prosecutorial misconduct; careless and inadequate defense counsel; and racial bias.[3] Of course, in all cases where wrongful convictions occur, the real perpetrator has escaped punishment. Through the use of DNA databases, however, the real perpetrator has been apprehended in more than a third of the post-conviction DNA exonerations.[4]

The profound effects of these wrongful convictions on the criminal justice system have yet to be fully acknowledged or appreciated. In this case, the South Carolina Supreme Court failed to recognize that the existence of apparently "overwhelming" forensic evidence against a defendant does not necessarily mean that he is

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[2] DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* xv (2000).

[3] *See generally* Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 163-202 (2003) (hereinafter "*Actual Innocence*").

[4] In a study by the Chicago Tribune of 115 post-conviction DNA exonerations, there were 51 cases where new suspects were identified through the use of DNA databases. *See* Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, Chic. Trib., Oct. 26, 2003.

guilty. Indeed, many Innocence Project clients have been exonerated after DNA testing conclusively demonstrated that evidence initially adjudged as "overwhelming" was in fact deeply flawed. This experience has underscored the need for protecting a robust and meaningful presumption of innocence at trial in order to prevent wrongful convictions from occurring in the first place.

The Innocence Project files this *amicus* brief in support of Bobby Lee Holmes's petition because experience dictates and due process requires that every defendant should have a fair opportunity to present evidence of his or her innocence to a jury. Unfortunately, the South Carolina Supreme Court failed to preserve Holmes's right to a fair jury trial by denying Holmes the ability to present to the jury credible and compelling evidence that a third party had committed the crime for which he was accused. Defying logic, the court below excluded this third-party guilt evidence by reference to "overwhelming" forensic evidence against Holmes, which, in the eyes of the court, lessened the relevance of Holmes's proof that somebody else committed the crime. To the contrary, Holmes's evidence that Jimmy White killed Mary Stewart was directly relevant not only to Holmes's general innocence claim, but also to his specific claim that the "overwhelming" forensic evidence against him was actually the product of either contamination or planting.

The prosecution of Bobby Lee Holmes is one of those rare but extremely important cases where a criminal defendant presents substantial and credible evidence that the police may have planted forensic evidence to secure a guilty conviction. Holmes was allowed to present parts of his theory of police misconduct to the jury but his efforts were severely hamstrung by the exclusion of credible third-party guilt evidence. Without this evidence, Holmes's innocence claim was less coherent and believable. The court's decision to exclude this vital evidence thus created a higher risk that the jury convicted an innocent man. In light

of this, *Amicus* files this brief in support of petitioner's request for a new trial.

I. SOUTH CAROLINA'S EVIDENTIARY RULE CANNOT PASS CONSTITUTIONAL MUSTER WHEN IT EXCLUDES EVIDENCE OF THIRD-PARTY GUILT THAT DIRECTLY UNDERMINES THE STRENGTH OF THE PROSECUTION'S EVIDENCE AGAINST THE DEFENDANT

In affirming the lower court's order denying Holmes an opportunity to present evidence of third-party guilt to the jury, the South Carolina Supreme Court relied on the standards set out in *State v. Gregory*, 16 S.E.2d 532, 534-35 (S.C. 1941), and *State v. Gay*, 541 S.E.2d 541, 550 (S.C. 2001) ("*Gregory-Gay* rule") to decree that where there is "strong evidence" of a defendant's guilt, especially where that evidence is forensic, proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the defendant's own innocence. *State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004), *cert. granted in part*, 73 U.S.L.W. 3604 et al. (U.S. Sept. 27, 2005) (No. 04-1327). As a result of the circular nature of this rule, the court did not consider how petitioner's third-party guilt evidence undermined the rule's premise that there was "strong" evidence of his guilt. This rule is constitutionally defective as a general matter,[5] inherently illogical and ill-conceived as an evidentiary matter, and is particularly unfair as applied to petitioner, given the plethora of evidence supporting Holmes's theory of fabrication and/or contamination of the forensic evidence. As explained below, it is for these reasons that the Innocence Project urges this Court to grant petitioner's request for a new trial.

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[5] This *amicus* brief does not address the constitutional arguments that South Carolina's rule violates a defendant's right to present a complete defense, as those arguments are addressed by petitioner.

A. South Carolina's Evidentiary Rule Is Unconstitutional Because It Undermines A Defendant's Constitutional Right To A Fair Jury Trial

1. The Presumption of Innocence

The presumption of innocence is a long-recognized and well-settled principle in our criminal justice system that is integral to a defendant's Fourteenth Amendment right to a fair trial. *See Bell v. Wolfish*, 441 U.S. 520, 533 (1979) ("Without question, the presumption of innocence plays an important role in our criminal justice system."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (citation omitted)); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). Because the presumption of innocence can be defeated only when the prosecution convinces the jury of a defendant's guilt with proof beyond a reasonable doubt, "[t]o implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process . . . courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle*, 425 U.S. at 503. The *Gregory-Gay* rule, as interpreted by the South Carolina Supreme Court, completely undermines this bedrock principle and interferes with the fundamental right to a fair trial guaranteed by the Constitution.

As construed and applied by the South Carolina Supreme Court, the *Gregory-Gay* rule compels a court – rather than a jury – to evaluate the strength of the

prosecution's evidence of defendant's guilt without also requiring that the trial court weigh and consider defendant's countervailing evidence. Based on the South Carolina Supreme Court's interpretation, the *Gregory-Gay* rule places the cart before the horse by allowing the court to determine that the evidence against a defendant is "strong" without ever considering the reliability of that evidence in light of the defendant's rebuttal evidence. In evaluating the strength of the prosecution's evidence against a defendant in a vacuum, the *Gregory-Gay* rule strips defendants of their right to present a defense and "'conflict[s] with the overriding presumption of innocence with which the law endows the accused.'" *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)).

The *Gregory-Gay* rule, as interpreted by the South Carolina Supreme Court, violates a defendant's due process rights because it allows a court to determine guilt – "strong" guilt – without requiring the State to carry its full burden of proof beyond a reasonable doubt. In requiring the trial court to consider only the prosecution's evidence, even when the defendant's evidence directly discredits it, the *Gregory-Gay* rule "undermine[s] the fairness of the fact-finding process," *Estelle*, 425 U.S. at 503, by making that process a one-sided *fait accompli*. Moreover, the *Gregory-Gay* rule turns the innocence presumption on its head by declaring that one-sided "strong" evidence of a defendant's guilt means that a defendant cannot raise a reasonable inference of his or her own innocence, rather than first allowing for the evaluation of countervailing evidence to determine *whether* the State can show, beyond a reasonable doubt, that a defendant is guilty. The South Carolina Supreme Court violated the innocence presumption in concluding, based exclusively on the State's evidence, that petitioner could not raise a reasonable inference of his own innocence.

2. The Right to a Jury Trial

The *Gregory-Gay* rule is also constitutionally defective because it "'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom*, 442 U.S. at 523 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 446 (1978)). The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). The right to a jury also "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* at 156; *see also Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (reaffirming the historical principle that "'[t]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis original)).

For Holmes, the jury's fact-finding function was arbitrarily relegated to a single trial court judge who made a pre-trial determination as to whether the third-party guilt evidence should be presented to the jury. What is most compelling about this case is that the South Carolina Supreme Court – in dizzying circularity – affirmed one judge's exclusion of all of petitioner's evidence of third-party guilt, despite the fact that much of that evidence discredited the very evidence on which the South Carolina Supreme Court relied. In so doing, the South Carolina Supreme Court allowed the *Gregory-Gay* rule to serve as a detour around petitioner's right to a jury trial. A

defendant's constitutional right to a jury trial, however, cannot hinge upon one judge's premature evaluation of evidence:

> A defendant may assuredly insist upon observance of this guarantee [of a right to a jury trial] even when the evidence against him is so over-whelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)). Likewise, these constitutional guarantees must be honored in this case, so that petitioner can exercise his right to have a jury evaluate *all* of the relevant evidence.[6]

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[6] Indeed, a jury is particularly well-suited to determine the significance of law enforcement's failure to investigate and prosecute Jimmy White for Mary Stewart's murder. The inquiry is a common-sense one into the motives and veracity of the witnesses in the case and is far less demanding than resolving the vital but highly technical conflicting testimony regarding the forensic DNA evidence in this case. As explained below, important technical problems with the DNA tests were raised by the defense and never answered by the prosecution. Yet without the third-party guilt evidence, the jury had an incomplete context in which to examine and resolve these scientific issues.

B. The *Gregory-Gay* Rule, As Interpreted By The South Carolina Supreme Court, Permits Exclusion Of Third-Party Guilt Evidence Even Where The Strength Of The Prosecution's Evidence Has Been Undermined By Credible Evidence Of Fabrication And Contamination

The flaws in the *Gregory-Gay* rule are demonstrated by its application in this case. The rule is a classic *non sequitur*. Neither as a matter of logic nor reason does it follow that, because the South Carolina Supreme Court concluded that the forensic evidence against Holmes was "strong" and "overwhelming,"[7] Holmes could not raise a reasonable inference of his innocence. This is especially true in this case because there was credible evidence of contamination that undermined the strength of the forensic evidence. Moreover, the excluded third-party guilt evidence, if admitted, might have convinced the jury that the government's forensic evidence was planted or contaminated.

Despite the court's contention that Holmes's claims did not "eviscerate" all of the forensic evidence and other evidence against him, 605 S.E.2d at 24 n.8, as set out below, the defense had a variety of important challenges to the forensic evidence and testimonial evidence that undermined the South Carolina Supreme Court's faulty premise that there was "strong" evidence of his guilt. Beyond the evidence collection problems, the missing evidence, the failure to perform certain tests, and the technical indications of contamination, the third-party guilt evidence itself actually impeached the forensic evidence. It stands to reason that Holmes should have been allowed to

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[7] A court is charged with evaluating the reliability and the relevancy of evidence rather than its "strength" or "overwhelming" nature. *See generally* Fed. R. Evid. 401, 402, 403.

present his third-party evidence so that it could be properly weighed in support of his claim of innocence.

Indeed, the trial court unknowingly highlighted why it was so important for Holmes to have the opportunity to present evidence of third-party guilt when it relied on cases holding that "the fact [that] the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the *weight* of the evidence, not to its *admissibility*," *id.* (emphasis added). Based on this proposition, the court should have allowed the third-party guilt evidence to be admitted subject to the weight that the jury would accord it.

1. Petitioner's Evidence Significantly Undermined the Premise of "Strong" Guilt

a. Third-Party Guilt Evidence

In addition to the plethora of third-party guilt evidence pointing to Jimmy White as the real perpetrator of the crime, much of the evidence that Holmes was barred from presenting to the jury raised questions as to whether the forensic evidence against Holmes was fabricated or planted. As part of his proffer of third-party guilt evidence relating to planting and fabrication, Holmes sought to use the testimony of Stephen Westbrook, who testified that Officer James "Boot" Smith and Investigator Beverly Jane Potts came to see him before Holmes's first trial and offered to get him out of jail if he would testify that Holmes had confessed to him. 605 S.E.2d at 23. In addition, Westbrook testified that in June 2000, two months before the pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute and was confronted by employees from the solicitor's office who tried to convince him to testify against Holmes in the second trial and who informed him that they had manufactured underwear evidence incriminating Holmes. *Id.*

Westbrook also testified to two admissions supporting petitioner's theory of fabrication. Westbrook testified that an employee of the solicitor's office stated that solicitor's office employees had lifted one of Holmes's palm prints from the county jail door to use against him at trial. *Id.* Westbrook also testified that Jimmy White told him that Officer Boot Smith had told White to keep quiet about his guilt and that he was out to "frame" Holmes and that Holmes's prior attorney urged White to testify against Holmes. *Id.* Although this evidence bears directly on the weight of the State's evidence, no jury was ever able to consider it in determining Holmes's guilt. Most significantly, in excluding this evidence, the South Carolina Supreme Court wholly ignored how the evidence undermined the "strong" evidence of guilt, as if Holmes had no discrediting evidence at all. This uninformed application of the *Gregory-Gay* rule is particularly troubling when viewed in light of the evidence Holmes was permitted to present, as detailed below.

b. Fabrication and Contamination Evidence

The heart of Holmes's defense theory was that all of the physical evidence offered against him, including the DNA evidence, the palm print evidence, and the fiber evidence, could be discredited as unreliable because it all passed through the hands of Captain Mobley, thereby creating the opportunity for fabrication and planting. Transcript ("Tr.") at 4289; *see also* Joint Appendix ("App.") at 180, Tr. at 2482. Holmes's theory was well supported by evidence that demonstrated that the police had the opportunity to plant, that authorities "lost" evidence that could have been used to establish this theory, and that they failed to perform tests that could have confirmed (or disproved) police fabrication and planting.

The defense's expert witness, Dr. Peter D'Eustachio, established that the DNA evidence against Holmes was

unreliable and displayed characteristics consistent with his theory of contamination or planting. There were three items that allegedly contained DNA evidence in this case: Holmes's underwear, his shirt, and a paper towel recovered from Ms. Stewart's apartment. The underwear and paper towel allegedly contained a mixture of both Ms. Stewart's and Holmes's DNA. App. at 308-09, Tr. at 3824. As Dr. D'Eustachio testified, there were important problems with the tests used to support this conclusion.

Initially, Dr. D'Eustachio pointed out that the FBI could not explain the appearance of "low-lying mounds" on the DNA charts. App. at 305-06, Tr. at 3820. Although the laboratory attempted to label these irregularities "dye blobs," Dr. D'Eustachio explained that the irregular mounds appeared in consistent positions on all the samples – a phenomenon quite in contradiction to the known and documented *random* occurrence of real dye blobs. App. at 305-07, Tr. at 3820-23. This was the first reason supporting Dr. D'Eustachio's conclusion that the DNA results were "unreliable." App. at 307, Tr. at 3822-23.

Even more troubling and relevant to Holmes's contamination and planting theories was Dr. D'Eustachio's finding that an allele not attributable to either Ms. Stewart or Holmes appeared at the D3S1358 ("D3") locus on both the paper towel and underwear.[8] App. at 308-13, Tr. at 3823-26, 3844-46. In other words, there was evidence of

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[8] At any particular DNA locus, an individual will have two alleles - one inherited from her mother and one inherited from her father. In this case, Ms. Stewart possessed a 14 allele and a 16 allele at the D3 locus, while Holmes possessed a 15 and 16 allele at the same locus. App. at 309, Tr. at 3825. On both the underwear and paper towel, however, there was an 18 allele clearly visible at the D3 locus that could not be attributed to either Holmes or Stewart. App. at 308-09, 311-13, Tr. at 3824-25, 3844-45. Dr. D'Eustachio explained that "the importance of it [the extra 18 allele] is that we know from looking at their known standards that neither Bobby Lee Holmes nor Mary Stewart is capable of producing type 18 DNA. They literally just don't have it in them." App. at 309, Tr. at 3825.

human DNA on the underwear and towel that could not have come from Ms. Stewart or Holmes. This extra DNA was never explained by the prosecution and is at the very least consistent with a theory of planting or contamination. This finding formed the second basis for Dr. D'Eustachio's conclusion that the DNA tests were "unreliable" and that the evidence was not handled in a manner "necessary to prevent contamination from one item to the next or from outside sources." App. at 310, Tr. at 3826.

Holmes's DNA-planting theory was also supported by testimony showing that Chief Mobley never noted the presence of blood on Holmes's underwear or shirt when he first inventoried the evidence. App. at 195, Tr. at 2621-23, 4293. Not only did the forensic evidence inventory sheet not refer to the presence of any blood, but it also did not contain any request for any scientific tests to be performed. Record on Appeal at 6771-72; Tr. at 4293-94. Miraculously, blood later appeared on these items after Ms. Stewart's blood samples were lost. Tr. at 3373, 3763, 4294-95. EDTA tests, which could provide reliable evidence as to whether the blood on the underwear and shirt came from a blood vial (consistent with a planting theory), were never performed. Tr. at 3765, 4302; *see, e.g., Cooper v. Brown*, 358 F.3d 1117 (9th Cir. 2004) (ordering the district court to order EDTA testing of a T-shirt after Cooper's filing of a habeas application because "[t]he presence of such a preservative [EDTA] would show that his blood was not on the t-shirt at the time of the killings, but was rather placed there at some later time"). Furthermore, Ms. Stewart's paper towel, which allegedly contained a mixture of Holmes's DNA and her DNA, was not sent to the South Carolina Law Enforcement Division ("SLED") for evaluation for nine days. App. at 192-93, Tr. at 2618, 4305.

The defense also sought to discredit the palm print evidence by reminding the jury that Captain Mobley testified that he was alone at the crime scene when he allegedly lifted two handprints, thereby demonstrating that

he had the opportunity to plant evidence. Tr. at 2566, 2595, 4290. No usable prints other than two palm prints were found throughout the entire house. Tr. at 2727, 4290. Significantly, Ms. Stewart's pocketbook, the money allegedly stolen from it, and the telephone were never tested for fingerprints. Tr. 2728, 2735-36, 4303 (pocketbook); App. at 192, 325, Tr. at 2614, 3944, 4303 (money); App. at 209, Tr. at 2728, 2735-36, 4303 (telephone). In addition, both palm prints, which allegedly came from the same door, contained two entirely different striation patterns, potentially indicating that they came from two different surfaces. App. at 214-15, Tr. at 3965, 3990-91, 4291.

Further questions were raised regarding the reliability of the fiber evidence used against petitioner and its accuracy in linking petitioner to the crime. The defense pointed out that the State argued that cotton and polyester fibers from Holmes's sweatshirt matched those found on Ms. Stewart's bed, but failed to explain how Holmes's tank top, which was underneath his sweat shirt, did not have any polyester fibers on it. Tr. at 4297. The defense also pointed out that the State failed to explain the source of unknown amounts of blue acrylic fiber, gold modacrylic fiber and a brown fiber ball. App. at 227-229, Tr. at 3028-30, 4298.

In addition to the issues raised at petitioner's trial about the fiber evidence, recently questions have been raised generally regarding the reliability of "matching" fibers to prove a defendant's presence at the crime scene. FBI Supervisory Physical Scientist Max M. Houck, a defender of microscopic hair comparison, has explained why fiber analysis is scientifically imprecise: "The number of different fiber types found on any one textile, such as clothing, therefore, is potentially very large, making it impossible to track each type to its source or sources." Max M. Houck, *Statistics and Trace Evidence: The Tyranny of Numbers*, 1 Forensic Sci. Comm. (1999). Houck explains that because there are 17 generic classes of manufactured fibers,

over 1,770 fiber manufacturers worldwide, 500 different types of cross-sectional shapes for manufactured fibers (not counting copycats and patent infringements), more than 8,000 dyes and pigments used in the coloring of textile fibers, all of which are assembled into finished textiles by approximately 113,000 manufacturers, the "web of production makes it difficult, if not occasionally impractical, to trace any one product and identify its components to their sources." *Id.* Although Houck concludes that trace evidence such as fibers often can answer "how" a crime was committed, "trace evidence can rarely tell us who definitively" committed the crime. *Id.* The South Carolina Supreme Court considered this unreliable fiber evidence as part of the "overwhelming" case against Holmes despite the cross-contamination evidence, further demonstrating the error of its premise.

In sum, all of the forensic evidence allegedly implicating Holmes - DNA, palm prints, and fibers - suffered from demonstrable reliability errors that undermine the South Carolina Supreme Court's conclusion that such evidence was "strong." At the very least, Holmes showed that planting or contamination was possible and not inconsistent with the scientific data.

2. Application of the *Gregory-Gay* Rule Is Particularly Dire When There Is Evidence of Planting

While rare, evidence planting does occur. *See, e.g., State v. Lee*, 778 So. 2d 656 (La. App. 4 Cir. 1/4/01) (affirming grant of motion for a mistrial and motion to suppress evidence where prosecutor planted evidence in defendant's clothes); *Chamberlain v. Mantello*, 954 F. Supp. 499, 512 (N.D.N.Y. 1997) (granting habeas petition where supervising officer committed perjury and planted evidence linking the inmate to the bicyclist's death and where the prosecution's expert framed the inmate and testified falsely regarding the evidence); *State v. Munson*, 886 P.2d 999 (Okla.

Crim. App. 1994) (overturning conviction where prosecutor deliberately suppressed photographs and reports suggesting defendant was innocent and where forensic evidence was provided by a doctor who later pled guilty to seven felony counts involving autopsies he performed or failed to perform in other cases); *Peek v. State*, 488 So. 2d 52 (Fla. 1986) (acquitting defendant after third retrial where expert testimony concerning hair identification evidence was proven false).[9] These case examples demonstrate why it is imperative that a defendant be permitted to present evidence rebutting the prosecution, including third-party guilt evidence. Indeed, if the State fabricates evidence against a defendant, it may be the defendant's only hope of discrediting it.

As stated in *Chamberlain*, the potential damage to our judicial system from such false evidence is profound:

> Our criminal justice system cannot tolerate perjury and evidence tampering from those whom we trust to enforce the law. Dishonesty by the law enforcement personnel of the State, left uncorrected, is a wellspring of tyranny. To tolerate such an attempt to pervert the truth would tarnish the well deserved reputation of the overwhelming number of police officials who are dedicated to justice.

954 F. Supp. at 512. Petitioner's evidence of third-party guilt is too important for its suppression to be tolerated. Therefore, because the third-party guilt evidence would support the defense's theory of planting, such evidence should at least go to the jury to determine its credibility and weight.

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[9] *See* Associated Press, *Inmates Freed from Death Row at a Glance*, July 6, 2003, LEXIS, News Library.

II. ABSENT THIS COURT'S INTERVENTION TO PROTECT PETITIONER'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, THERE IS A SIGNIFICANT RISK THAT AN INNOCENT MAN WILL BE EXECUTED AND THE ACTUAL PERPETRATOR WILL REMAIN FREE TO CONTINUE TO ENDANGER THE PUBLIC

Had Holmes been given the opportunity to present evidence of third-party guilt to the jury, the evidence on which he was convicted may have appeared far less "overwhelming." Indeed, as the case examples below demonstrate, DNA testing has exonerated many individuals who were convicted on the basis of an apparent wealth of forensic evidence, which was later discredited. If these defendants had not been given the opportunity to prove their innocence, they could have spent their lives in prison or, even worse, they could have been executed, and the real perpetrators – who were conclusively matched by these same DNA tests – may never have been identified, thereby leaving the public at risk of additional acts of brutality.

A. Christopher Ochoa and Richard Danziger

Christopher Ochoa and Richard Danziger were convicted on the basis of seemingly overwhelming evidence for the rape and murder of Nancy DePriest. Christopher Ochoa was brought to the Austin, Texas police station for questioning a few weeks after the murder, where, after a long interrogation, he gave a detailed confession, telling the police that he committed the crime with his friend, roommate, and fellow employee Richard Danziger. *See* Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002. Ochoa pled guilty to the crime and later testified at Danziger's trial. *Id.* Danziger was convicted on the basis of Ochoa's testimony, in addition to the expert testimony of a State hair examiner who concluded that a single pubic hair found near the victim's body was "microscopically similar" to Danziger's. *See* Mark Wrolstad, *Hair-Matching Flawed as a*

Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide, Dallas Morning News, Mar. 31, 2002, at 1A. Both men remained in prison for more than a decade. *See* Donald, *supra*.

Post-conviction DNA testing later conclusively exonerated both Ochoa and Danziger by excluding both men as the source of the semen found in the victim's body. *Id.* Instead, the single DNA profile was found to be a perfect match to Achim Marino, a man who had confessed to DePriest's murder years earlier in a letter to then-Governor George W. Bush. *Id.*

Because of the mistaken focus on Ochoa and Danziger as the perpetrators, Marino was free to terrorize at least two more individuals. *See* Offender Information Detail, Texas Department of Criminal Justice, *available at* http://168.51.178.33/webapp/TDCJ/index2.htm. After he murdered Nancy DePriest, Marino committed at least two aggravated robberies. *Id.* At the time of his confession in 1996, he was serving three life sentences for sexual assault and aggravated robbery with a deadly weapon. *Id.* The wrongful conviction of Ochoa and Danziger therefore had real consequences for the lives of other innocent citizens.

B. Kirk Bloodsworth

Another DNA exoneration in the face of seemingly "overwhelming" evidence of guilt is that of Kirk Bloodsworth, who was convicted and sentenced to death in 1985 for the rape and murder of a nine-year-old girl. *See* Edward Connors et al., *Convicted by Juries After Trial*, 35-37 (1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (June 1996). Bloodsworth was a twenty-two-year-old man who had recently been honorably discharged from the United States Marine Corps and who had never been arrested. *Larry King Live* (CNN television broadcast July 21, 2005).

At trial, prosecutors introduced extensive eyewitness and physical evidence of Bloodsworth's guilt. *See* Connors, *supra*. Five eyewitnesses testified that they were certain that Bloodsworth was the man they saw with the victim just prior to her murder. *Id.* Police officers testified that during Bloodsworth's first police interrogation, he identified a weapon used in the crime that was not known to the public at the time. *Id.* Bloodsworth's acquaintances testified that he said he had done something "terrible" that day. *Id.* The prosecution presented evidence that the police had received an anonymous call informing them that Bloodsworth was seen with the victim earlier that day and that a shoe impression found near the victim's body was the same size as Bloodsworth's. *Id.* Bloodsworth was found guilty and sentenced to death. *Id.*

In 1993, however, Bloodsworth became the first death row inmate in the nation to be exonerated and released based on post-conviction DNA testing, when those tests excluded him as the source of the semen samples from the crime scene. Alisa Bralove, *Baltimore County Accepts Plea Deal in 1984 Murder of Rosedale Girl*, Daily Rec., May 21, 2004. A decade later, after the Innocence Project convinced the prosecutors to retest the remaining evidence with DNA technology that would permit the assailant's profile to be entered into state and federal DNA data banks, the sample matched the DNA profile of the true assailant, Kimberly Shay Ruffner. *See* Stephanie Hanes, *'84 Investigation Quick to Overlook the Culprit*, Balt. Sun, May 22, 2004. Ruffner was in prison for an attempted rape and murder committed three weeks after the rape and murder of the young girl for which Bloodsworth was initially convicted. *Id.* This serves as another example of the innocent lives that are destroyed in the wake of the wrongful conviction of one individual.

C. Ronald Williamson and Dennis Fritz

In 1987, Ronald Williamson and Dennis Fritz were convicted of the rape and murder of a twenty-one-year-old

Oklahoma woman. Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, N.Y. Times, Apr. 19, 1999, at A12. The evidence against Williamson and Fritz appeared to be compelling, including detailed testimony from multiple witnesses. Glen Gore, one of the State's chief witnesses, testified that he saw Williamson at the victim's place of employment shortly before her murder. *See* Plaintiffs' Brief in Support of Summary Judgment, *Fritz v. City of Ada* (E.D. Okla. Jan. 8, 2002) (No. 2000-CV-194) ("Fritz Brief"). A prison inmate claimed that Fritz had confessed in detail to the murder and that she had heard Williamson threaten to harm someone's mother as he had the victim. *Id.* Other witnesses testified that the victim had previously complained to a friend that these two men "made her nervous" and that Williamson told the police (while in custody) about a vivid "dream" he had about the crime. *Id.* The State's forensic experts testified that *seventeen* hairs from the crime scene "matched" either Williamson or Fritz, and that upon serological analysis, both men were possible contributors of sperm that was recovered from the victim. Dedman, *supra*.

Once both men were in jail, a DNA profile was finally run on the semen found in the victim's body. Fritz Brief, *supra*. The test results conclusively excluded both Williamson and Fritz. *Id.* The DNA profile from the semen instead matched Glen Gore - the prosecution's star witness. Dedman, *supra*. DNA testing also proved that not one of the seventeen hairs deemed to be "matches" with Williamson or Fritz at the time of trial (under the microscopic analysis then available) belonged to either. *Id.* As a result, both defendants were exonerated and released from prison in 1999. *Id.* Fritz had faced life in prison and Williamson was nearly executed. *Id.*

When the State finally matched the DNA to Gore, he was in prison for an unrelated first-degree burglary, kidnapping, and assault. *See* Offender Lookup, Oklahoma Department of Corrections, *available at* http://docapp8.

doc.state.ok.us (follow "Offender Information" hyperlink; then follow "Offender Lookup" hyperlink; then search "153663" under ODOC#). Gore was in an unsupervised prison work detail and escaped from custody for several days upon learning that Fritz and Williamson were exonerated by DNA evidence. *See* Diana Baldwin, *Experts Disagreed on Hair Analysis*, Daily Oklahoman, May 27, 2001. The State's mistaken focus on Fritz and Williamson permitted Glen Gore, the true rapist and murderer, to remain unaccountable for this crime for years.

D. Darryl Hunt

Darryl Hunt was sentenced to life in prison for the murder of Deborah Sykes, a twenty-five-year-old woman, primarily due to several eyewitness who testified that Hunt was at the scene of the crime around the time that the crime was committed. *See State v. Hunt*, 457 S.E.2d 276 (N.C. 1994). Sykes had been viciously stabbed to death after being raped and beaten on August 10, 1984, in North Carolina. *See* Phoebe Zerwick, *New Suspect in Hunt Case*, Winston-Salem J., Dec. 20, 2003.

Ten years later, in 1994, DNA testing had excluded Hunt as the source of the sperm found in Sykes's body, but prosecutors contended that the evidence was contaminated or belonged to an unidentified co-assailant. Joseph Neff & Michael Biesecker, *Wrongly Convicted Man Freed*, The News Observer, Dec. 25, 2003, at A2. Hunt's attorney requested and obtained additional DNA testing in April 2003 that also excluded Hunt as the assailant. Lisa Hoppenjans & Phoebe Zerwick, *Brown Pleads Guilty to Murder of Sykes*, Winston-Salem J., Dec. 17, 2004, at A1. When the 2003 DNA profile was compared with the national database of convicted felons, it led them to Willard Brown, who had originally been a suspect in Sykes's murder. *Id.* Brown pled guilty to first-degree murder, rape, kidnapping, and robbery of Sykes and was sentenced to life plus ten years in prison. *Id.* Hunt's case

serves as another example of the many years of life that can be lost due to wrongful convictions.

E. Ray Krone

The existence of apparent overwhelming "scientific" evidence also led to the conviction of another individual, Ray Krone, for the vicious murder of Kim Ancona, a thirty-one-year-old woman, who was found on December 29, 1991, nude and stabbed to death in the men's restroom of the bar where she worked. Beth DeFalco, *DNA May Free 1st Arizonan Inmate Convicted Twice in Murder*, Ariz. Republic, Apr. 5, 2002, at 1A. The only "forensic" evidence investigators had were bite marks on the victim's breast and neck. Henry Weinstein, *Death Penalty Foes Mark a Milestone*, L.A. Times, Apr. 10, 2002. Ray Krone also lived near the bar where the crime was committed and was in Ms. Ancona's address book. *Id.* Krone agreed to give the police a dental impression by biting down on a plastic foam cup. *Id.* A dentist helping police at the crime scene examined Krone's bite mark and concluded that it was consistent with the mark on the victim's left breast. Scott Dodd, *New Evidence May Free Inmate; Bites on Body Led to Verdict*, Times-Picayune, June 11, 1995, at A16.

Krone was initially convicted of murder and kidnapping and received a death sentence. DeFalco, *supra*. At a second trial, he received a life sentence instead. *Id.* In 2002, Krone's attorneys requested post-conviction DNA testing of the blood and saliva found on the victim. *Id.* The results excluded Krone and instead matched a man named Kenneth Phillips, who had lived 600 yards away from the location of the crime and who was in the DNA database because he had been convicted of attempted child molestation. *Id.* Phillips was later arrested on charges that he sexually assaulted and attempted to strangle a seven-year-old girl three weeks after Ancona's murder. Robert Nelson, *Ray Krone's Got It All. A New Look. Money. Problem Is, He Can't Seem To Forgive Those Who Screwed Up and Put*

Him on Arizona's Death Row, Phoenix New Times, Apr. 21, 2005.

These examples demonstrate the risk of serious error in our criminal justice system even when the evidence supporting a conviction initially appears unassailable. The need for caution is particularly acute in heinous capital cases, where emotions run high and where community pressure on police and prosecutors to secure convictions can be overwhelming. *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 532 (2005) (citing Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 123, 129-33 (Autumn 1998); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000)). As the cases above demonstrate, the conviction of an innocent person also leaves the real criminal free to continue to endanger the public. Most of all, these cases demonstrate why no defendant should be unreasonably deprived of his right to prove his innocence through DNA testing or evidence of third-party guilt.

CONCLUSION

In an epilogue to his decision vacating Ronald Williamson's conviction, Chief Judge Frank Seay wrote:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death.
>
> My friend asked, "Is he a murderer?"
>
> I replied simply, "We won't know until he receives a fair trial."

> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.
>
> ACCORDINGLY, the Writ of Habeas Corpus shall issue . . . .

Williamson v. Reynolds, 904 F. Supp. 1529, 1576-77 (E.D. Okla. 1995). For the foregoing reasons, the Innocence Project urges the Court to grant petitioner a new trial.

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